Supreme Court, U.S.
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No. 00-14

In The

Supreme Court of the United States

FRED T. PENO and PATRICIA L. PENO,

Petitioners,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LEE E. ULLMAN, ESQUIRE
Counsel of Record
MARK ALAN RAITH, ESQUIRE

Attorneys for Respondent State Farm
FORRY, ULLMAN, ULLMAN
& FORRY, P.C.
540 Court Street
P.O. Box 542
Reading, Pennnsylvania 19603
(610) 777-5700

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. DOES THIS CASE MEET THE COURT'S REQUIREMENT FOR CERTIORARI JURISDICTION?

   Suggested Answer: NO.

2. IS PENNSYLVANIA'S STATUTORY ONE-YEAR SUIT LIMITATION ON FIRE LOSS CLAIMS RENDERED NULL AND VOID BY AN INSURER'S DENIAL OF COVERAGE BASED ON A DETERMINATION THAT THE FIRE WAS ATTRIBUTABLE TO AN INTENTIONAL ACT ON THE PART OF THE INSURED?

   Suggested Answer: NO.

3. IS PENNSYLVANIA'S STATUTORY ONE-YEAR SUIT LIMITATION ON FIRE LOSS CLAIMS RENDERED NULL AND VOID BY AN INSURER'S PAYMENT OF ADDITIONAL LIVING EXEPENSES TO THE INSURED PRIOR TO THE ULTIMATE DENIAL OF COVERAGE?

   Suggested Answer: NO.

PARTIES TO THE PROCEEDING

The Petition for Writ of Certiorari does not contain a Statement of Parties to the Proceeding. Petitioners are Fred T. Peno and Patricia L. Peno.

Respondent is State Farm Fire & Casualty Company, an Illinois corporation in the business of insurance with a principal place of business located at One State Farm Plaza, Bloomington, Illinois. State Farm is not a subsidiary or affiliate of any publicly owned corporation, nor does any publicly owned corporation, not a party to the appeal, have any financial interest in the outcome of this appeal.

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REASONS FOR DENYING THE WRIT

This Court should deny the Petition for Writ of Certiorari for two fundamental reasons: (1) this case fails to meet the strigent requirements for certiorari jurisdiction; and (2) the lower courts correctly decided an issue of purely Pennsylvania law.

I.

THIS CASE DOES NOT MEET THE COURT'S STRINGENT REQUIREMENTS FOR CERTIORARI JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States clearly states that review on a writ of certiorari is not a matter of right, but is only granted for "compelling reasons." *See* Rule 10 of the Rules of the Supreme Court of the United States.

The Petition for Writ of Certiorari filed by the Penos takes no note of nor reference to this requirement, nor do petitioners make any effort to demonstrate why this case should be considered by the Supreme Court of the United States after two lower federal courts, the United States District Court for the Middle District of Pennsylvania and the Third Circuit Court of Appeals, reached an identical decision on a matter of purely Pennsylvania state law.

In *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 86 L.Ed.2d 394, 105 S.Ct. 2794 (1985), the Court reiterated that as a matter of normal practice, the Court will defer to the construction of a state statute given it by the lower federal courts. *See also Chardon v. Fumero Soto*, 462 U.S. 650, 654-655, n. 5, 77 L.Ed.2d 74, 103 S.Ct. 2611 (1983);

Haring v. Prosise, 462 U.S. 306, 314 n. 4, 76 L.Ed.2d 595, 103 S.Ct. 2368 (1983). The Court stated:

> We do so not only to 'render unnecessary review of their decisions in this respect' *Cort v. Ash*, 422 U.S. 66, 73 n.6, 45 L.Ed.2d 26, 95 S.Ct. 2080 (1975) but also to reflect our belief that district courts and courts of appeal are better schooled and more able to interpret laws of their respective states. *See Bishop v. Ward*, 426 U.S. 341, 345-346, 48 L.Ed.2d 684, 96 S.Ct. 2074 (1976); *Gooding v. Wilson*, 405 U.S. 518, 524 n.2, 31 L.Ed.2d 408, 92 S.Ct. 1103 (1972).

In *Spokane Arcades*, the Court reversed a ruling by the Ninth Circuit Court of Appeals that had reversed a ruling by the Eastern District of Washington rejecting all constitutional challenges to a Washington state statute enacted to prevent and punish the publication of obscene materials. The Court held that the Ninth Circuit erred in invalidating any more of the state statute than was necessary. While observing that the rule of deference to the lower courts in matters of state law was "not ironclad" and that the Court had the authority to "differ" with the lower federal courts as to the meaning of a state statute, the Court elaborated in a footnote:

> The Court has stated that it will defer to lower courts on state law issues unless there is "plain error." *Palmer v. Hoffman*, 318 U.S. 106, 87 L.Ed.2d 645, 63 S.Ct. 447 (1943) . . . or if the lower court is "clearly wrong." *The Tungus v. Skovgaard*, 358 U.S. 588, 3 L.Ed.2d 524, 79 S.Ct. 583 (1959).

See 86 L.Ed.2d at 403, n. 9.

As set forth more fully below, neither the Middle District of Pennsylvania nor the Third Circuit Court of Appeals committed "plain error" in this case, nor were their rulings "clearly wrong." But even beyond that, the facts of this case and the legal issues involved fall far short of what has been called the "national significance" this Court has as a general rule required for the exercise of certiorari jurisdiction.

One case in which the Court granted certiorari jurisdiction, albeit by a 5 to 4 vote, was *Leavitt v. Jane L.*, 518 U.S. 137, 135 L.Ed.2d 443, 116 S.Ct. 2068 (1996). In *Jane L.*, the Court held in a *per curiam* opinion that the grant of certiorari was appropriate "when the alternative is allowing blatant federal court nullification of state law." 135 L.Ed.2d at 450. The state law in dispute in *Jane L.* was a Utah statute regulating abortions. The lower federal rulings were based on a matter of purely Utah state law on the "severability" of certain provisions of the Utah statute.

State Farm respectfully submits that the only way this Court could have had any conceivable obligation to prevent a "blatant federal court nullification of state law" in this case would be if the lower federal courts had somehow gotten it wrong and opted to ignore years of controlling Pennsylvania state law precedent by nullifying the validity and operation of Pennsylvania's statutory one-year suit limitation requirement. This did not happen in this case. However, even if the lower courts had made such an erroneous determination, a grant of certiorari would be utterly inconsistent with this Court's long-held practice of deferring to lower court decisions in matters

of purely state law. As Justice Stevens stated in a dissent opinion in *Jane L.*:

> The courts of appeal are more familiar with and thus better qualified than we to interpret the laws of the states within their Circuits; the decision of a federal court (even this Court) on a question of state law is not binding on state tribunals; and a decision of a state law issue by a court of appeal, whether right or wrong, does not have the kind of national significance that is the typical predicate of our certiorari jurisdiction.

135 L.Ed.2d at 451.

Justice Stevens stated that grants of certiorari under such circumstances were "irregular" in the past, but today were "virtually unheard of." 135 L.Ed.2d at 451.

As attested to by many Pennsylvania state court decisions, some of which are cited below, the operation of Pennsylvania's statutory one-year suit limitation requirement on fire loss claims is not an insignificant matter. Nevertheless, there was "no blatant federal court nullification of state law" because the lower courts correctly followed and applied Pennsylvania law. Furthermore, unlike *Spokane Arcades* or *Jane L.*, where the state statutes involved attempted to regulate obscenity and abortion and in doing so directly implicated serious constitutional issues, there are no such momentous constitutional issues at stake in this case. There is simply no need and no basis for this Court to consider an issue of purely Pennsylvania state law that has already been decided correctly.

Accordingly, State Farm respectfully requests that this Honorable Court deny the Penos' Petition for a Writ of Certiorari.

II.

PENNSYLVANIA'S STATUTORY ONE-YEAR SUIT LIMITATION REQUIREMENT IS NOT NULLIFIED BY A SUBSEQUENT DENIAL OF COVERAGE

There is no law supporting Petitioners' argument that State Farm's "voiding" of the policy nullified Pennsylvania's one-year suit limitation requirement.

The subject policy of homeowners insurance contained this "Condition" on page 13:

> 8. **Suit Against Us.** No action shall be brought unless there has been compliance with the policy provisions. The action must be started within one year after the date of loss or damage.

This clause is consistent with the requirements of Section 636 of the Pennsylvania Insurance Code, which provides as follows:

> **Suit.** No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been compiled with, and unless commenced within twelve months next after inception of the loss.

See 40 Pa. C.S.A. § 636.

There is no dispute that the date of loss in this case is January 9, 1996. Plaintiffs did not file this lawsuit until

November 12, 1997. Courts applying the law of the Commonwealth of Pennsylvania have consistently upheld the one-year suit limitation provision when, as in this case, the insurance contract conforms to the mandated statutory language. *See, e.g., Williams Studio v. Nationwide Mutual Insurance Company*, 550 A.2d 1333, 380 Pa. Super. 1 (1988), *appeal denied*, 588 A.2d 510, 527 Pa. 588 (1988).

As the Western District of Pennsylvania stated in *Abels v. State Farm Fire & Casualty Co.*, 596 F. Supp. 1661, 1464 (W.D. Pa. 1984), *vacated on other grounds*, 770 F.2d 26 (3d Cir. 1985):

> . . . 40 P.S. s 636 provides that all standard fire insurance contracts prepared in Pennsylvania must contain a one-year limitation of action provision. The Pennsylvania Supreme Court has consistently upheld the validity of this provision and, further, has ruled that the insurer need not show prejudice in order to assert the limitation provision as a defense.

Id.

Petitioners' argument that the voiding of the contract of insurance based on State Farm's determination that the subject fire was the result of arson by the insured also voided the suit limitation clause is unsupported by any case law. As the Third Circuit pointed out, the "intentional acts" exclusion does not give State Farm the right to unilaterally void coverage. Petitioner's interpretation would effectively nullify Pennsylvania's suit limitation provision in all arson cases.

A.

State Farm did not "instigate" the criminal prosecution of Fred Peno

Petitioners' primary argument in the lower courts is their completely unsubstantiated allegation that criminal proceedings were brought against Fred Peno "at the instigation" of State Farm. The undisputed record in the lower courts affirmatively establish that this allegation is completely untrue. Petitioners made no attempt whatsoever during the district court proceedings to produce any evidence supporting their allegation that State Farm instigated the prosecution of Fred Peno.

To the contrary, as both lower courts noted, State Farm's cooperation with the criminal investigation was mandated by Pennsylvania law. State Farm was legally obligated under Pennsylvania's Arson Reporting Immunity Act, 40 Pa. C.S.A. § 1610.3 ("the ARIA") to provide the State Police with any information relating to State Farm's investigation of the Peno fire. This statute leaves no doubt whatsoever that State Farm would have been acting unlawfully had it *not* cooperated with the State Police.

Both lower courts correctly concluded that the ARIA had changed Pennsylvania law regarding the obligation of an insurer to cooperate with a criminal arson investigation. The lower courts also correctly rejected Petitioners' reliance on the Pennsylvania Superior Court's decision in *Diamon v. Penn Mutual Fire Insurance Co.*, 247 Pa. Super. 534, 372 A.2d 1218 (1977).

In *Diamon*, the Superior Court of Pennsylvania held that the one-year suit limitations period was "suspended"

based on the insurer's "inducement" of criminal arson charges against its insured. In the twenty years since *Diamon* was announced, the decision has been criticized and its reasoning has not been consistently applied. *See e.g., Black v. Double Tree Hotels Corp.*, 5 F. Supp. 2d 321, 323 (E.D. Pa. 1998); *McElhiney v. Allstate Insurance Co.*, 33 F. Supp. 2d 405 (E.D. Pa. 1999).

As the Eastern District of Pennsylvania stated in *McElhiney*:

> . . . Even if [*Diamon*] is the law in Pennsylvania, the bad faith conduct alleged in *Diamon* involved an insurer which, without any apparent basis, caused criminal charges to be filed against an insurer . . . if allegations of bad faith conduct by an insurer could automatically suspend a time limitation clause, such a clause would be virtually meaningless.

Id. at 408.

The lower courts correctly held that Pennsylvania's one year suit limitation requirement was valid and applicable in this case.

III.

STATE FARM'S PAYMENT OF ADDITIONAL LIVING EXPENSES DID NOT "INDUCE" PLAINTIFFS OR WAIVE THE ONE YEAR SUIT LIMITATION REQUIREMENT

The Petitioners' argument that State Farm's payment of Additional Living Expenses ("ALE") somehow "estopped" State Farm from invoking the one-year suit limitation requirement is equally erroneous.

State Farm's payment of Additional Living Expenses ("ALE") during the pendency of State Farm's investigation into the fire was a contractual requirement, not a waiver of any possible defenses State Farm may have chosen to assert later. State Farm advised Plaintiffs as early as January 10, 1996, one day after the fire, that State Farm was not waiving any potential defenses. On February 14, 1996, Plaintiffs received a formal "reservation of rights" letter from State Farm. Clearly, by providing the Plaintiffs with ALE State Farm was acting properly under the contract of insurance and Pennsylvania law.

Furthermore, had State Farm refused to provide the Plaintiffs with ALE based on a preliminary and unsubstantiated suspicion that the subject fire was arson, this almost certainly would have amounted to an act of bad faith under Pennsylvania law. *See, e.g., Polselli v. Nationwide Mutual Fire Insurance Company*, 23 F.3d 747, 751 (3d Cir. 1994) (insurer acted in bad faith by failing to provide Plaintiff with additional living expenses for over a year after a fire destroyed Plaintiff's home while investigation into the fire was proceeding).

The lower courts properly concluded that State Farm did not waive and was not estopped from denying coverage based on the State Farm's initial payment of ALE. There is no need for this Court to review those correct decisions.

CONCLUSION

For the reasons set forth above, respondent State Farm Fire & Casualty Company respectfully requests that this Honorable Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

FORRY, ULLMAN, ULLMAN
& FORRY, P.C.

Dated: August 1, 2000

LEE E. ULLMAN, ESQUIRE
MARK ALAN RAITH, ESQUIRE
540 Court Street
P.O. Box 542
Reading, Pennsylvania 19603
(610) 777-5700

Attorneys for Respondent State Farm